RECENT EXPERIENCE WITH THE INITIATIVE AND REFERENDUM

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The more intensively one tries to study the interesting phenomena of direct legislation the more humble does he become. To look closely, for example, at the two hundred and ninety-one constitutional and legislative measures which the people of thirty-two States voted upon in 1914 is to be impressed with the number and significance of the things about that remarkable election which one cannot possibly know. How superficial at best must be our insight into that complex of social, political, economic and human forces which lay back of the presentation of those measures and the popular decision upon them. It is in full realization of the peril which lies in the way of sweeping classifications and glib generalizations that the conclusions drawn in the course of this brief discussion of the recent experience with the initiative and referendum petition are offered with considerable hesitancy.

I

There is an aspect of recent experience with direct legislation however, which may be analyzed with more or less accuracy. We can determine the extent to which initiative and referendum petitions are being used and it is apparent that the number of proposals thus submitted by popular action is increasing. Twenty-seven more initiative and referendum measures were presented to the people in 1914 than in 1912. This means however, a broader geographical application of direct legislation rather than a general increase in the average number of laws submitted in the individual States. The Oregon ballot of 1912 still holds the record in presenting the largest number of initiated or re-

ferred laws which ever confronted the voters of a single State in one election. On the other hand the circulator of petitions seems nowhere to be growing weary of his task and in some States is more energetic than ever.

Critics of the system have long declared that direct legislation would rob the state legislator of his dignity and destroy his sense of responsibility to the people. He would become a mere automaton and the important work of legislation would be carried on at the polls. Needless to say no such complete emasculation of state law-making bodies has anywhere occurred. The legislators in Oregon, Washington or California still grind out laws with as great rapidity and steadiness as though they were paid for their statesmanlike labors by the piece instead of by the day. It is nevertheless a matter of some concern that in the larger direct legislation States there is a tendency on the part of the legislature to submit an ever increasing number of proposals to the people for ratification. Twenty-two of the forty-eight measures presented to the people of California in 1914 and nine of the eleven presented in 1915 were placed on the ballot by the legislature itself while the legislators of the other initiative and referendum States were only slightly less active in this way. The legislature must, of course, refer its proposed constitutional amendments to popular vote, but its willingness to refer numerous statutes in addition would seem to indicate a readiness to share its burdens and responsibilities. The state legislator is certainly not jealous of any competition which may arise in the field of law-making.

It may perhaps be interesting to note that the initiator of laws continues to be much more energetic on the whole than the reformer who utilizes the referendum. This is strikingly apparent in Oregon where the simple and direct expedient of writing one's own law is vastly more popular than the more uncertain process of lobbying it through the legislature. There is also a slight tendency to increase the number of constitutional amendments submitted by initiative petition as compared with the statutes initiated or referred. This practice of inserting into the constitution detailed provisions which ought to be enacted

in the form of statutes is much to be deplored. It is small consolation moreover, to reflect that the process bids fair to continue, in part at least, by reason of its own momentum since detailed administrative provisions in a state constitution can be changed to meet new conditions only by means of other constitutional amendments.

There is recently discernible a marked increase in the practice of repeatedly submitting by means of initiative petition measures which have previously been defeated by the people. It will be recalled that woman suffrage was three times rejected at the polls before it was finally adopted by the voters of Oregon. In 1914 a dozen previously rejected measures were again presented to the people, while in the November election of 1915 two of these measures reappeared in California and two in Ohio. Ohio, in fact, has had a very curious experience with those proposals which like Banquo's ghost will not down. Seven times since 1912 have the voters of that State been called upon to repeat their decisions regarding measures presented to them. A statewide policy in regard to the liquor traffic has been before the Ohio voters in the last four elections. This practice of persistently submitting the same question is severely criticized on the ground that a measure which a majority of the voters disapprove may finally win by default as it were merely because its opponents have grown weary of the monotonous task of voting it down. On the other hand the proponents of woman suffrage and prohibition, the most common legislative perennials, feel that in no other way can they so effectively carry on their educational campaigns as by continually placing their proposals upon the ballot. They regard perseverance in this direction as a cardinal virtue. Whatever the merits of the controversy may be, there is a strong body of opinion in favor of requiring an interval of six or eight years to intervene before a defeated measure may be submitted to popular vote a second time.

There are some interesting recent developments in the direct legislation States relating to the use of emergency clauses under which measures of immediate importance to the health, safety and welfare of the State are permitted to go into effect without

the ordinary delay which makes possible the filing of a referendum petition. The friends of direct legislation have jealously watched the extent to which the state legislatures have made use of these emergency clauses for the purpose of preventing laws from being referred to the people. In 1912 Oregon adopted a constitutional amendment forbidding the declaring of an emergency in cases of taxation and exemption. Another curb on the possible abuse of the emergency clause has lain in the power of the governor to veto either the entire bill or merely the section of it in which the emergency is declared. This partial veto of the governor was used for this purpose four times during the 1915 session of the Washington state legislature. During the last year still another protection against the abuse by the legislature of the emergency clause has come into prominence. This is the determination by the supreme court of Washington in the case of State *ex rel* Brislawn v. Meath (147 Pac. 11, May, 1915) followed in three subsequent cases, that whether or not an emergency actually exists which should exempt a statute from the operation of the referendum is a question which the courts will examine and settle. This doctrine is in direct conflict with that announced by the supreme court of Oregon in 1903 in the case of Kadderly v. The city of Portland (44 Ore. 118), and it permits any interested citizen to resort to the courts if he feels that the legislature has abused its power in declaring an emergency. An examination of the session laws of Oregon and Washington for the last two legislative sessions does not, however, disclose any noticeable tendency toward a wholesale and unwarranted use of the emergency power.

II

A brief consideration may be given to the classes who at present are using the initiative and referendum petition. It is perhaps natural that a more or less steady popular rejection of their schemes should somewhat dampen the enthusiasm of those ardent spirits who believe that every hardship or injustice to which mankind falls heir can be alleviated by the enactment of statutes of a millennial type. A glance at the recent ballots from the

Pacific States reveals a marked abatement in the zeal of the Utopian reformer. Towns and communities which, a few years ago, preferred to urge their local needs and desires through the ballot rather than before the state legislature are showing much less zeal in the circulation of initiative and referendum petitions. The spectacular legislative duel fought in 1908 between the Oregon fishermen of the upper Columbia and those of the lower Columbia has not been duplicated in recent elections. Certain well defined classes or groups, however, continue successfully to propose legislation in their own behalf. A striking illustration is the labor interests who have consistently used the initiative and referendum petition and have secured the enactment of many progressive laws. As we have already seen friends and enemies of woman suffrage and prohibition, where their battles are not already permanently won, display an unabated zeal in the circulation of petitions. There is at least one marked example of the use of the referendum for a partisan end. In November, 1915, the alleged Republican "gerrymander" act was, largely through the efforts of the Democratic party in the State, referred to the people of Ohio and was defeated. Although the measure was perhaps open to general criticism, the contest in regard to it seems to have been staged and fought out primarily on party lines.

The system of direct legislation has acquired a certain respectability even in the minds of its critics by reason of the fact that it has persisted and spread. It is but natural, therefore, that groups in the community which a few years ago regarded the initiative and referendum with open hostility and scorn are beginning somewhat cautiously to explore and utilize its resources. Thus we have presented the somewhat anomalous picture of a group of political conservatives seeking to restrict the scope and operation of the initiative and referendum by means of the initiative petition itself. Many students of direct legislation would be glad to see an increase in the number of petition signers necessary to put a measure on the ballot, an increase in the size of the majority necessary to adopt certain kinds of proposals, or a restriction upon the re-submission of defeated measures. Half

a dozen or so such measures have been submitted under the initiative in the last few years. The voter in the direct legislation States, however, seems to regard them with the same degree of friendliness with which he would view a proposal for his own disfranchisement. On the whole it may be safely stated that there is recently noticeable a tendency on the part of an ever increasing number of groups and classes to avail themselves of whatever benefits the system of direct legislation has for them.

III

Brief comment may well be made on the type of proposal which has recently been presented to the people through the initiative and referendum petition. When the system of direct legislation was quite new in this country the measures which appeared upon the ballot, when they rose to the dignity of state-wide interest, dealt most frequently with problems essentially political. Laws and amendments of political import are still presented in considerable number. One cannot fail to be impressed, however, with the rapidity and decisiveness with which that emphasis is being shifted. The political reformer is resting from his labor and in his place stands the man who demands social and economic readjustment. Perhaps it is more accurate to say that the political reformer, having accomplished most of his ambitions, has now turned his attention to these deeper and more difficult problems of community welfare. Thus where the people were voting upon proposals for direct primaries a few years ago, today they are solving the problems of minimum wage and social insurance.

It is encouraging to note that measures of trivial importance and local concern are less and less frequently submitted to popular vote. They have become the exception rather than the rule. It looks as though the day might even now be in sight when the voters of a populous State will cease entirely to be confronted with the problem whether fish may be taken from Rogue River with a hook and line or what courses of study shall be pursued at the state normal school.

There is one respect, however, in which the character of the measures which are now being presented by the initiative and referendum petition gives less cause for rejoicing. We are in a period of administrative reorganization and adjustment. The result is that the ballot in the direct legislation States is being crowded with elaborate proposals of a highly technical character. They are not matters of slight importance or local concern. It is of great moment to the voters of any State how public service companies shall be regulated and by what process land may be condemned for public use. But to submit these matters to popular vote is to strain the interest and intelligence of the citizen and invite the most haphazard results in the way of legislation. Surely if the debate, discussion, compromise and amendment which take place in legislative chambers and committee-rooms are needed anywhere they are needed in the drafting of these elaborate measures. But there seems to be an increasing readiness on the part of state legislatures and petition circulators to refer this kind of proposal to direct vote of the people. Of course whenever these highly technical provisions are written into the state constitution a vicious circle is started since such provisions will usually demand or be thought to demand frequent readjustment and change possible only through repeated popular votes. This aspect of the problem, however, does not seem to cause serious concern in the direct legislation States, and Arizona has recently created this same vicious circle in the making of statute-law by providing through constitutional amendment that laws enacted by the initiative or referendum shall not be voted, or amended or repealed by the legislature. Thoughtful critics of direct legislation cannot but regret that a tendency so hostile to the efficient and careful enactment of law continues to prevail and increase.

We have seen that the initiative and referendum petitions are being used more frequently, by an ever widening circle of groups and classes, for purposes vitally affecting the welfare of the community and in ways which directly concern the efficiency of the state government. Direct legislation is a growing, not a diminishing phenomenon. It presents a problem ever more complex,

ever more important. The feeling that it is always open season upon every phase of the initiative and referendum is passing away. It is not unreasonable to expect that unimpassioned and critical study of the system, in the light of a constantly lengthening and broadening experience will make apparent those readjustments which may be necessary to make the initiative and referendum petition a more accurate, more reliable, more efficient governmental device.